No. 20,844

United States Court of Appeals

For the Ninth Circuit

DARRELL ZWANG and ELODYMAE ZWANG,
Appellants,

vs.

STEWART L. UDALL, as Secretary of the Interior of the United States of America,
Appellee.

On Appeal from the United States District Court for the Southern District of California, Central Division
Honorable E. Avery Crary, Judge

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The "action" of April 3, 1963, was a nullity. Since it was a nullity it did not toll the limitation period. Upon the expiration of the limitation period, appellants were and are entitled to patents. Other points raised by appellee have no merit.

ARGUMENT

I. THE STATUTE REQUIRED A HEARING.

The central fact in this case is that the so-called "action" of April 3, 1963, was taken *ex parte,* with-

out prior notice, and without a hearing. The applicable statute required a hearing. This is true whether the applicable statute is 43 C.F.R. 1852.2, entitled "Government contests", or whether it is the more general Administrative Procedure Act (5 U.S.C. § 1001, et seq.). *Adams v. Witmer,* 271 F. 2d 29 (C.A. 9, 1958); *Stewart v. Penny,* 238 F. Supp. 821 (D. Nev. 1965). It is recognized by appellee in his decision of February 3, 1965 (Exh. E), wherein he states that factual disputes must be resolved "in accordance with the Department's contest procedures".

II. THE APRIL 3, 1963, ACTION WAS A NULLITY.

In the famous *Morgan* case Chief Justice Hughes wrote:

> "Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirements of due process as to notice and hearing. For the statute itself demands a full hearing and the [Secretary's] order is void if such a hearing was denied". *Morgan v. United States,* 298 U.S. 468, 477, 479, 481, 56 S. Ct. 906, 80 L. Ed. 1288 (1936).

This is probably as far as it is necessary to go to decide this case. It really matters little whether the label used is "protest", "contest" or something else. What is void is void, whether for the purpose of 43 U.S.C. § 1165, or for any other purpose. As pointed out in one of the late *Morgan* cases, failure to afford the opportunity for a hearing is more than a procedural irregularity. It is a vital defect. *Morgan v.*

United States, 304 U.S. 1, 14, 22, 58 S. Ct. 773, 82 L. Ed. 1129 (1937).

Consideration of the broader concept of due process leads to the same result. *Cameron v. United States,* 252 U.S. 450, 459-460, 40 S. Ct. 410, 412 (1920); *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334, 337, 83 S. Ct. 379, 9 L. Ed. 2d 350 (1963); *Adams v. Witmer,* supra.

III. THE RUNNING OF 43 U.S.C. § 1165 WAS NOT TOLLED.

43 U.S.C. § 1165 is a statute of limitation. Statutes of limitation are not tolled by action which is a nullity! *Lillibridge v. Riley,* 316 F. 2d 232, 233 (C.A. 5, 1963).

The basic question to be answered in determining, whether, under a given set of facts, a statute of limitation is to be tolled, is one of legislative intent whether the right shall be enforceable after the prescribed time. *Burnett v. New York Central Railroad Co.,* 380 U.S. 424, 426, 85 S. Ct. 1050 (1965). The legislative intent is clear here: The lapse of two years after the issuance of the receipt will bar a contest or protest based on any charge whatsover. *Payne v. Newton,* 255 U.S. 438, 41 S. Ct. 368, 65 L. Ed. 720 (1920).

IV. THERE WAS NO ADMINISTRATIVE REMEDY TO EXHAUST.

As has been pointed out, the April 3, 1963, action was a nullity. 43 C.F.R. § 1862.6 plainly states that the purpose of 43 U.S.C. § 1165 is to "transfer from

the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute".

V. OTHER POINTS RAISED BY APPELLEE LACK MERIT.

Appellee's statement that he has been charged by Congress with the responsibility for the administration and disposition of public lands is true, but the generality does not apply to the facts of this case.

Appellee argues in several places that the action of April 3, 1963, was a "protest" within the meaning of 43 U.S.C. § 1165. The action was null and void. In any event 43 C.F.R. 1852.1-2, cited by appellee (Br. 18), does not support appellee's argument. 43 C.F.R. 1852.1-2 is a subdivision of 43 C.F.R. 1852.1. 43 C.F.R. 1852.1 is entitled "*Private* contests and protests". It refers to "objection . . . to any action proposed to be taken in any proceeding before the Bureau". The April 3, 1963, action was not an objection to action proposed to be taken in a proceeding before the Bureau. It was (or rather, purported to be) the action itself.

In support of his "protest" argument, appellee quotes in part (Br. 15-16) from *Lane v. Hoglund,* 244 U.S. 174, 37 S. Ct. 615, 61 L. Ed. 1066 (1917). It is readily apparent, however, that the Rules of Practice referred to in the quotation from *Lane* (Br. 16) are not the same as the current Public Administrative Procedures set out in 43 C.F.R. Group 1800. *Lane* was

decided 21 years before the enactment of the Code of Federal Regulations, and when the C.F.R. was enacted the Administrative Procedure Act (5 U.S.C. § 1001, et seq.) was still a gleam in its mother's eye.

What *Lane* does stand for is that judicial inquiry is not only proper in this area, but as well often necessary to correct palpable administrative abuse.

Appellee also mentions the Land Office decision of May 8, 1962 (Br. 18; Exh. A). The reason for mentioning it is obscure. It was reversed on October 10, 1962, was of no further moment, and is not one of the issues set forth in the Pre-Trial Order (R. 20).

Appellee seemingly overlooks the point that even if the April 3, 1963, action *was* a "contest or protest" within the meaning of 43 U.S.C. § 1165, it was set aside on February 3, 1965, and on February 4, 1965, more than two years after the issuance of the receipt, the entries stood unchallenged. They stand unchallenged today.

VI. APPELLEE EASILY COULD HAVE PREVENTED THE RUNNING OF 43 U.S.C. § 1165.

All appellee had to do to prevent the running of the limitation period was to follow the law and the regulations. That he chose not to is certainly no fault of appellants. As stated in *O'Boyle v. Coe,* 155 F. Supp. 581, 584 (W.D. Mo. 1957):

> "The administrative discretion, however, is not unlimited or unbridled. It must be a sound legal discretion. Whether a dispensation should be

granted is not a matter of grace, but must be determined on sound legal principles. In a democratic society the acts of government officials are not based on grace but on established principles of law".

See also, *Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Comm.,* 310 F. 2d 606, 613 (C.A. 9, 1962).

CONCLUSION

Appellants are entitled to patents for their entries.

Dated, Coalinga, California,
June 20, 1966.

FRAME & COURTNEY,
By TED R. FRAME,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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